80-1018

Supreme Court, U. S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EDEN H. POND,
EDNA H. BOBE,
CONSOLIDATION COAL COMPANY,
Appellants,

v.

ULYSSES G. WALDEN, JR.
CAROLYN SALLEE WALDEN,
Appellees,

LOUISE F. SHORT,
Intervenor.

ON APPEAL FROM THE SUPREME COURT OF INDIANA

JURISDICTIONAL STATEMENT

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THE QUESTIONS PRESENTED FOR REVIEW

This Appeal raises the issue of the constitutionality of an Indiana Statute, Indiana Code 1971, 32-5-11-1 through 32-5-11-8, commonly known as the Indiana Mineral Lapse Act, which statute provides that a mineral interest severed from the surface is deemed to have lapsed if a use of the mineral interest is not made within twenty years of the severance or if a statement of claim setting forth the ownership of the severed mineral interest is not filed within the statutory period with the recorder in the county in which the property is located. There are four constitutional questions presented for review:

a) Whether the Indiana Mineral Lapse Act violates procedural due process protections of the Fourteenth Amendment, Section 1, of the Constitution of the United States by failing to provide for any notice or hearing prior to the termination of the mineral interest, or at some meaningful time after the termination of the mineral interest.

b) Whether the Indiana Mineral Lapse Act constitutes an impairment of contract in violation of the Constitution of the United States, Article I, Section 10, by voiding contractual conveyances of mineral interests, with there being no overriding public interest which justifies the methods used in transferring ownership of the mineral interest.

c) Whether the Indiana Mineral Lapse Act constitutes a taking of private property without compensation and for private use in violation of the due process clause of the Fourteenth Amendment, Section 1, of the Constitution of the United States, in that no compensation is given to the owner of the severed mineral interest upon the lapse of this interest pursuant to the statute and the ownership is thereby transferred to a private rather than public entity.

d) Whether the provision in the Indiana Mineral Lapse Act - which provides that owners of more than ten mineral interests in a county who inadvertently fail to file a statement of claim, must be given written notice prior to the lapse of their interest, when similar protection is not provided for owners of less than ten mineral interests in a county - violates the equal protection clause of the Fourteenth Amendment, Section 1, of the Constitution of the United States.

THE PARTIES TO THE PROCEEDING

All of the parties to the proceeding are shown in the caption with the exception that Theodore L. Sendak, the Attorney General for the State of Indiana, is also a party to this Appeal, and has received notice of the appeal.

There is a companion case, although not consolidated with the present case, which raised substantially the same issues before the Supreme Court of Indiana as the present case, styled "*Louise F. Short v. Texaco, Inc., et al.*, Supreme Court of Indiana, No. 179 S. 23." Both this case and the *Short* case concern the constitutionality of the Indiana Mineral Lapse Act ("the Act") as applied to interests in oil, gas and other fugacious minerals. The instant case raises, additionally, the constitutionality of the act as applied to coal and other solid minerals. While the questions presented are largely parallel, certain conceptual distinctions were raised below which might dictate differing conclusions as between solid and fugacious minerals.

TABLE OF CONTENTS

Page

The Questions Presented for Review 1

The Parties to the Proceedings 2

Table of Contents 3

Table of Authorities 4,5

Reference to the Opinion Below 6

Statement of the Grounds on which the Jurisdiction of this Court is Invoked 6

Constitutional Provisions and Statutes Involved 6

Statement of the Case 11

Questions are Substantial 14

Conclusion 24

Appendix A - Opinion and Judgment of the Supreme Court of Indiana A-1

Appendix B - Trial Court's Memorandum Opinion and Judgment on Agreed Case A-16

Appendix C - Order of the Indiana Supreme Court Denying Rehearing A-20

Appendix D - Notice of Appeal to the Supreme Court of the United States A-21

TABLE OF AUTHORITIES

Cases: Page

Allied Structural Steel Company v. Spannaus, (1978) 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 21

Bickle v. Fairchild, (May, 1978) 83 Mich.App. 467, 268 N.W.2d 881 ..... 15, 22

Chicago and Northwestern Transportation Company v. Pederson, (1977) 80 Wis.2d 566, 259 N.E.2d 316 ..... 15, 17, 18, 21, 22

City of New Orleans v. Duke, (1976) 427 U.S. 297, 96 S. Ct. 2513, 49 L.Ed.2d 511 23

Contos v. Herbst, (1979) _____ Minn. _____, 278 N.W.2d 732 ..... 16, 17, 21

James T. M. Prest, appellant v. Robert L. Herbst, et al., appellees, No. 79-49, _____ U.S. _____, 100 SC 24, 62 L.Ed.2d 17 17

Louise F. Short v. Texaco, Inc., et al., Supreme Court of Indiana, No. 179 S 23 2

Louise F. Short v. Texaco, Inc., et al., (1980) _____ Ind. _____, 406 N.E.2d 625 ..... 6, 13, 18, 22

Memphis Light, Gas & Water Division v. Craft, (1978) 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 20

Missouri Pacific R. Co. v. Nebraska ex rel. Board of Transportation, (1896) 164 U.S. 403, 17 S.Ct. 130, 41 L.Ed. 489 22

Mullane v. Central Hanover Trust Company, (1950) 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 20

Ochoa v. Hernandez y Morales, (1913) 230 U.S. 139, 33 S.Ct. 1033, 57 L.Ed. 1427 20

Cases (con't.): **Page**

United States Trust Company v. New Jersey, (1977) 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed. 2d 92 21

Van Slooten v. Larsen, (1978) ____ Mich. App. ____, 272 N.W.2d 675 16

Wheelock v. Heath, (1978) 201 Neb. 835, 272 N.W. 2d 768 ..... 16, 22

Wilson v. Bishop, (October, 1980) _____ Ill. _____, _____ N.E.2d _____ 17, 18, 21

Constitutional Provisions:

Constitution of the United States, Article I, Section 10 1

Constitution of the United States, 14th Amendment, Section 1 ..... 2, 6

Statutes:

Indiana Code 1971, § 32-5-11-1 *et seq.* 1, 6, 11

Indiana Code 1971, § 32-5-11-1 ..... 7, 19

Indiana Code 1971, § 32-5-11-2 7

Indiana Code 1971, § 32-5-11-3 8

Indiana Code 1971, § 32-5-11-4 8

Indiana Code 1971, § 32-5-11-5 ..... 9, 23

Indiana Code 1971, § 32-5-11-6 ..... 10, 20

Indiana Code 1971, § 32-5-11-7 10

Indiana Code 1971, § 32-5-11-8 11

Indiana Code 1971, § 34-1-29-1 *et seq.* 11

Title 28, United States Code, Section 1257, Sub-paragraph 2 6

REFERENCE TO THE OPINION BELOW

The Supreme Court of Indiana combined the present case with the aforementioned case of *Short v. Texaco, et al.*, for purposes of its opinion. This opinion is reported as *Short v. Texaco*, _____ Ind. _____, 406 N.E.2d 625 and it is reprinted in Appendix A hereto.

The unreported "Memorandum Opinion and Judgment on Agreed Case" entered by the Judge of the Gibson County Circuit Court, dated July 24, 1978, is reprinted in Appendix B hereto.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Indiana, declaring constitutional the Indiana Statute, Indiana Code 32-5-11-1 through 32-5-11-8, commonly known as the Indiana Mineral Lapse Act, was entered on June 23, 1980.

A petition for rehearing, timely filed, was denied on September 24, 1980. (Appendix C)

A Notice of Appeal to this court was duly filed in the Supreme Court of Indiana on December 5, 1980. (Appendix D)

This Appeal is being docketed in this court within ninety (90) days from the denial of rehearing below. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1257, Subparagraph 2.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

14th Amendment, Section 1, United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of

the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, Sec. 10, United States Constitution:

"No state shall enter into any treaty, alliance or a confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin as tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts, or grant any title of nobility."

The Indiana Code (Compiler's additions shown in bold face type):

32-5-11-1 [46-1808]. Lapse of mineral interest - Prevention. - Any interest in coal, oil and gas, and other minerals, shall, if unused for a period of 20 years, be extinguished, unless a statement of claim is filed in accordance with section five [32-5-11-5] hereof, and the ownership shall revert to the then owner of the interest out of which it was carved. **[IC 32-5-11-1, as added by Acts 1971, P.L. 423, § 1.]**

32-5-11-2 [46-1809]. Mineral interest - Definition. - A mineral interest shall be taken to mean the interest which is created by an instrument transferring, either by grant, assignment, or reservation, or otherwise an interest, of any kind, in coal, oil and gas, and other minerals. **[IC 32-5-11-2, as added by Acts 1971, P.L. 423, § 1.]**

32-5-11-3 [46-1810]. Use of mineral interests - Definition. - A mineral interest shall be deemed to be used when there are any minerals produced thereunder or when operations are being conducted thereon for injection, withdrawal, storage or disposal of water, gas or other fluid substances, or when rentals or royalties are being paid by the owner thereof for the purpose of delaying or enjoying the use or exercise of such rights or when any such use is being carried out on any tract with which such mineral interest may be unitized or pooled for production purposes, or when, in the case of coal or other solid minerals, there is production from a common vein or seam by the owners of such mineral interests, or when taxes are paid on such mineral interest by the owner thereof. Any use pursuant to or authorized by the instrument creating such mineral interest shall be effective to continue in force all rights granted by such instrument. [IC 32-5-11-3, as added by Acts 1971, P.L. 423, § 1.]

32-5-11-4 [46-1811]. Statement of claim - Filing - Requirements. - The statement of claim provided in section one [32-5-11-1] above shall be filed by the owner of the mineral interest prior to the end of the twenty-year period set forth in section two [one] [32-5-11-1] or within two [2] years after the effective date [September 2, 1971] of this act, whichever is later, and shall contain the name and address of the owner of such interest, and description of the land, on or under which such mineral interest is located. Such statement of claim shall be filed in the office of the recorder of deeds in the county in which such land is located. Upon the filing of the statement of claim within the time provided, it shall be deemed that such mineral interest was being used on the date

the statement of claim was filed. [IC 32-5-11-4, as added by Acts 1971, P.L. 423, § 1; 1972, P.L. 11, § 15.]

32-5-11-5 [46-1812]. Extinguishment of mineral interest - Exceptions. - Failure to file a statement of claim within the time provided in section 4 [32-5-11-4] shall not cause a mineral interest to be extinguished if the owner of such mineral interest:

(1) Was at the time of the expiration of the period provided in section four [32-5-11-4], the owner of ten [10] or more mineral interests, as above defined, in the county in which such mineral interest is located, and;

(2) Made diligent effort to preserve all of such interests as were not being used, and did within a period of ten [10] years prior to the expiration of the period provided in section four [32-5-11-4] preserve other mineral interests, in said county, by the filing of statements of claim as herein required, and;

(3) Failed to preserve such interest through inadvertence, and;

(4) Filed the statement of claim herein required, within sixty [60] days after publication of notice as provided in section seven [32-5-11-7] herein, if such notice is published, and if no such notice is published, within sixty [60] days after receiving actual knowledge that such mineral interest had lapsed. [IC 32-5-11-5, as added by Acts 1971, P.L. 423, § 1.]

32-5-11-6 [46-1813]. Successor in interest - Notice requirements - Prima facie evidence. - Any person who will succeed to the ownership of any mineral interest, upon the lapse thereof, may give notice of the lapse of such mineral interest by publishing the same in a newspaper of general circulation in the county in which such mineral interest is located, and, if the address of such mineral interest owner is shown of record or can be determined upon reasonable inquiry, by mailing within ten [10] days after such publication a copy of such notice to the owner of such mineral interest. The notice shall state the name of the owner of such mineral interest, as shown of record, a description of the land, and the name of the person giving such notice. If a copy of such notice, together with an affidavit of service thereof, shall be promptly filed in the office of the recorder of deeds in the county wherein such land is located, the record thereof shall be prima facie evidence, in any legal proceedings, that such notice was given. [IC 32-5-11-6, as added by Acts, 1971, P.L. 423, § 1.]

32-5-11-7 [46-1814]. Statement of claim - Filing - Recorder's duty. - Upon the filing of the statement of claim, provided for in section 4 [32-5-11-4] of this chapter or the proof of service of notice as provided in section seven [six] [32-5-11-6] of this chapter in the recorder's office for the county where such interest is located, the recorder shall record the same in a book to be kept for that purpose, which shall be known as the "Dormant Mineral Interest Record" and shall indicate by marginal notation on the instrument creating the original mineral interest the filing of the statement of claim or affidavit of publication and service of notice. [IC 32-5-11-7, as added by Acts, 1971, P.L. 423, § 1.]

32-5-11-8 [46-1815]. Waiver of chapter's provisions - Time limit. - The provisions of this chapter may not be waived at any time prior to the expiration of the twenty [20] year period provided in section 1 [32-5-11-1]. [IC 32-5-11-8, as added by Acts 1971, P.L. 423 § 1.]

STATEMENT OF THE CASE

The action at bar was filed in the Circuit Court of Gibson County, Indiana, as an Agreed Case, with an Agreed Statement of Facts, pursuant to an Indiana Statute, Indiana Code 1971, Sections 34-1-29-1 and following. The parties stipulated that the sole issue for determination by the trial court was whether the Indiana Mineral Lapse Act, Indiana Code 1971, Sections 32-5-11-1 through 32-5-11-8, was constitutional under the Constitution of the United States and the Constitution of the State of Indiana. All of the questions set forth in the section of this Jurisdictional Statement entitled "The Questions Presented for Review" were first raised and presented to the trial court. The Agreed Statement of Facts may be summarized as follows:

On March 1, 1954, Clara M. Haper, Eden H. Pond and Edna H. Bobe were the owners as tenants in common of an eighty acre tract of land in Gibson County, Indiana. On that date, they conveyed by Warranty Deed this eighty acre tract to Ulysses Walden and Mildred Walden, his wife. This Warranty Deed contained a reservation of the total mineral estate by the grantors, Clara M. Haper, Eden H. Pond and Edna H. Bobe.

On August 13, 1959, Ulysses G. Walden and Mildred Walden conveyed by Warranty Deed to Ulysses G. Walden, Jr. and Carolyn Sallee Walden, his wife, a seventy-nine acre tract of land which was part of the aforementioned eighty acre tract.

About the year 1958, Clara M. Haper died intestate leaving as her sole and only heirs her daughters, Eden H. Pond and Edna H. Bobe, who succeeded to the interest of Clara M.

Haper in the severed minerals under the eighty acre tract.

On June 17, 1976, Eden H. Pond, Edna H. Bobe and Raymond W. Bobe, her husband, as lessors, made, executed and delivered to Consolidation Coal Company, as lessee, a coal mining lease covering forty acres of the aforementioned seventy-nine acre tract. On March 4, 1977, Ulysses Grant Walden, Jr., and Carolyn Sallee Walden gave written notice to Edna H. Bobe and Eden H. Pond of the lapse of the mineral interest pursuant to the Indiana Mineral Lapse Act. On the same date, March 4, 1977, there was published in the Princeton Daily Clarion, a daily newspaper in Gibson County, Indiana, a notice of the lapse of the mineral interest pursuant to the Indiana Mineral Lapse Act. On May 27, 1977, Charles R. Nixon, as the Attorney for Ulysses Grant Walden, Jr., sent a notice to Consolidation Coal Company of the claim of his client, Ulysses Grant Walden, Jr.

On January 12, 1978, the Agreed Statement of Facts (Complaint) was filed in the Circuit Court of Gibson County, Indiana. It was stipulated by Eden H. Pond and Edna H. Bobe that they had made no use of the mineral interest as defined by the Mineral Lapse Act, and had not filed a Statement of Claim with the Recorder of Gibson County, Indiana, setting forth their ownership of the mineral interest. It was further stipulated by the parties that the sole question for determination by the trial court was whether the Indiana Mineral Lapse Act is constitutional under the Constitution of the United States and the Constitution of the State of Indiana. If the statute is unconstitutional, Eden H. Pond and Edna H. Bobe are the owners of the mineral interest in and under the subject property. If the Mineral Lapse Act is constitutional, the owners of the mineral interest pursuant to the statute are Ulysses G. Walden, Jr. and Carolyn Sallee Walden, his wife.

Pursuant to an Indiana statute, the Attorney General of the State of Indiana was notified during the lawsuit that the constitutionality of a state statute was being questioned. The attorney general entered his appearance in the action and submitted trial briefs on the question of the constitutionality of the act. In addition, Louise F. Short filed a Petition to

Intervene in the action and such petition was granted by the court. After the questions regarding the constitutionality of the Indiana Mineral Lapse Act were fully briefed and oral argument was heard, the Trial Court rendered its "Memorandum Opinion and Judgment on the Agreed Case" [Appendix B] on July 24, 1978, holding that the Indiana Mineral Lapse Act was unconstitutional.

Several weeks after the trial court's opinion and judgement in the present case, the trial court issued its judgment in another case that was pending in the Gibson Circuit Court involving the constitutionality of the Indiana Mineral Lapse Act, which case was styled *Louise F. Short v. Texaco, Inc., et al.* This case involved oil and gas mineral interests only. The trial court held that the Indiana Mineral Lapse Act was also unconstitutional as it applied to oil and gas mineral interests.

Constitutional questions being involved, pursuant to the Indiana Rules of Appellate Procedure, a direct appeal was taken from the Trial Court judgment to the Supreme Court of Indiana. Again, all the questions presented in this appeal were raised, briefed and argued before the Supreme Court of Indiana. The Attorney General of the State of Indiana was a party to the appeal and represented the State of Indiana on the question of the constitutionality of the act. The aforementioned case of *Short v. Texaco* was also appealed directly to the Supreme Court of Indiana. The Supreme Court of Indiana combined the present case with *Short v. Texaco* for purposes of oral argument and opinion. However, the cases were never consolidated.

On June 23, 1980, the Supreme Court of Indiana issued a joint opinion in the two cases - the present case and *Short v. Texaco* - reversing the Trial Court and declaring that the Indiana Mineral Lapse Act was constitutional. A Petition for Rehearing was timely filed with the Supreme Court of Indiana, which petition was denied on September 24, 1980.

QUESTIONS ARE SUBSTANTIAL

The fundamental issue presented by this appeal is the determination of what constitutional parameters and guidelines apply to legislation of the same general nature and thrust of the Indiana Mineral Lapse Act. Legislative enactments similar to that here in question - variously designated as dormant mineral acts or mineral lapse acts - have become prevalent in recent years and have, in various forms and under various theories, been adopted in a number of states. As energy shortages continue and intensify, it is certain that additional efforts of a similar nature will be made, both in states which have not previously ventured into the particular area and in those where prior attempts have been found unconstitutional. Unless and until definitive guidance as to Federal Constitutional concerns is available from the ultimate arbiter, continued confusion and instability is inevitable, thus confounding the announced purposes of this family of legislation. The question is not whether the states are acting within the police power in enacting such legislation. Nor is it a question of whether such legislation is necessary or helpful in promoting mineral development, although there is a strong difference of opinion on the effectiveness of such legislation. Rather, what must be decided is exactly what constitutional safeguards should apply to this form of legislation. The Indiana Mineral Lapse Act is an example of a state legislature passing legislation in an attempt to promote mineral development, without due regard to appropriate constitutional safeguards.

Conflict Among States

Several other states in addition to Indiana have passed legislation generally similar to the Indiana Mineral Lapse Act. This type of legislation is commonly referred to as dormant mineral legislation. Such other states include Michigan, Wisconsin, Nebraska, Minnesota and Illinois. The constitutional validity of each of these dormant mineral statutes has been

challenged in their respective state courts.

The Supreme Court of Wisconsin considered the constitutionality of Wisconsin dormant mineral legislation in the case styled *Chicago and Northwestern Transportation Company v. Pederson*, (1977) 80 Wis. 2d 566, 259 N.W. 2d 316. Under the Wisconsin statute the owners of severed mineral rights were required to record the severance instrument with the register of deeds of the county within three years from the date of the act or the date of the instrument, whichever was later. Failure to record within this time period caused the mineral interest to revert to the surface fee owner. The Wisconsin statute differed from the Indiana Mineral Lapse Act in that "use" of the mineral interest did not preserve the mineral interest. In addition, the statute required payment of an initial, and thereafter an annual, registration fee to preserve the mineral rights. Failure to pay such registration fee within three years from the due date also resulted in the reversion of the mineral interest to the surface fee owner. The Supreme Court of Wisconsin held that the Wisconsin dormant mineral statute was unconstitutional because it denied procedural due process to the owner of the mineral interest and because it constituted a taking of private property from one person for the private use of another without compensation.

Two separate panels of the Court of Appeals in the State of Michigan have considered the constitutionality of that state's dormant mineral legislation and have reached directly opposite conclusions. The Michigan statute applied only to severed oil and gas interests. It provided that the owner of the oil and gas mineral interest had twenty years in which to make certain statutorily defined uses of the property or record a Notice of Interest with the register of deeds, or else the mineral interest would be deemed abandoned, with a reversion to the surface owner. There was also a three year grace period immediately following the effective date of the act allowing the mineral interest owners to record their notice preserving their interest. The Court of Appeals of Michigan in the case of *Bickle v. Fairchild*, (May, 1978) 83 Mich.App. 467, 268 N.W.2d 881, held the Michigan dormant mineral act to be unconstitutional as

applied to the defendants in that case, the owners of the mineral interest, in that it constituted an unconstitutional impairment of the obligations of contracts prohibited by the Constitution of the United States, Article 1, Section 10. In October of 1978, a second panel of the Court of Appeals of Michigan in the case of *Van Slooten v. Larsen*, (1978) _____ Mich.App. _____, 272 N.W.2d 675, held that the Michigan dormant mineral act was constitutional, finding that it was a valid exercise of the police power. This case did not cite the prior decision of *Bickle v. Fairchild*.

In December of 1978, the Supreme Court of Nebraska rendered an opinion regarding the constitutionality of the Nebraska dormant mineral act in a case styled *Wheelock v. Heath*, (1978) 201 Neb. 835, 272 N.W.2d 768. The Nebraska statute applied to all severed mineral interests and provided that the owners of the surface could bring an action seeking a termination and extinguishment of the severed mineral interest, naming as parties-defendant all persons having or appearing to have an interest in the severed mineral interest. The severed mineral interest would be deemed abandoned if, for a period of twenty-three years prior to the filing of the lawsuit, certain satutorily defined uses of the property had not been made nor a verified claim of interest recorded. There was also a two year grace period after the effective date of the statute in which the severed mineral interest owner could assert his claim. The Supreme Court of Nebraska held that the Nebraska dormant mineral act was unconstitutional, insofar as it attempted to operate retroactively, as being violative of the due process and contract clauses of the United States and the Nebraska Constitutions.

The Minnesota Supreme Court in the case of *Contos v. Herbst*, (1979) _____ Minn. _____, 278 N.W.2d 732, considered the constitutionality of that state's dormant mineral legislation, which provided for the forfeiture of a severed mineral interest to the state unless the record owner filed a registration statement. Notice was provided for by publication in a newspaper within the local county and in two mining publications with nationwide circulation and the statute further

provided for compensation following forfeiture. However, the Supreme Court of Minnesota held that the statute was violative of due process in that it made no provision for a hearing to determine the validity of the forfeiture. An appeal from this decision was taken to this court, but was summarily dismissed for want of a substantial federal question. *James T. M. Prest, appellant v. Robert L. Herbst, et al., appellees*, No. 79-49, _____ U.S. _____, 100 SC 24, 62 L.Ed.2d 17. The dismissal of the appeal by this court in the *Contos* case, should be controlling in the present case on the question of the constitutionality of the Indiana Mineral Lapse Act.

Most recently the Supreme Court of the State of Illinois considered the question of the constitutionality of that state's dormant mineral legislation in the case of *Wilson v. Bishop*, (October, 1980) _____ Ill. _____, _____ N.E.2d_____. The Illinois statute provided that if a severed oil and gas mineral interest had not been produced, or a written notice filed with the County Recorder's Office setting out the ownership, within twenty-five years after its creation, the severed mineral interest would be deemed abandoned with the interest then vesting in the owner of the surface. There was a three year grace period after the effective date of the act to produce oil and gas or file the written notice. The Illinois Supreme Court held that the statute was unconstitutional in that the owners of the severed mineral interest were entitled to the procedural safeguards of due process and that failure to provide adequate notice and opportunity to be heard rendered the legislation unconstitutional.

As is apparent from the above synopses of the various state court cases determining the constitutionality of dormant mineral legislation, there is a conflict among the various jurisdictions regarding the applicability of constitutional provisions as to this general type of legislation. This conflict is further shown by the opinion of the Indiana Supreme Court in the present case in which it cited and discussed the aforementioned Wisconsin Supreme Court case of *Chicago and Northwestern Transportation Company v. Pederson*, (1977) 80 Wis.2d 566 259 N.W.2d 316, which had held the Wisconsin Dormant Mineral Act unconstitutional. The Indiana Supreme Court,

in reaching the opposite conclusion on the constitutionality of this type of legislation, stated:

> "Based upon the foregoing analysis we do not find the case of *Chicago and Northwestern Transportation Company v. Pederson, supra*, persuasive.
>
> The reasoning of the Trial Court in the cases relied upon by it do not warrant the conclusion that the act is unconstitutional because it fails to afford notice and hearing to mineral interest owners required by procedural due process." (406 N.E.2d at 629)

In the aforementioned Illinois Supreme Court case of *Wilson v. Bishop*, (October, 1980) _____ Ill. _____, _____ N.E.2d _____, in which the Illinois dormant mineral act was held to be unconstitutional, the Illinois Supreme Court considered the Indiana Supreme Court's decision in the present case and found it unpersuasive. The Illinois Supreme Court stated:

> "In *Short v. Texaco, Inc.*, (1980) _____ Ind. _____, 406 N.E.2d 625, however, the Indiana Supreme Court upheld a statute that provided for the reversion of severed mineral interests to surface owners if, after twenty years, no specified acts of ownership had occurred or no claim of interest had been filed within two years after the effective date of the act. The court concluded that the statute comported with procedural due process upon finding that its enactment, along with the opportunity to prevent reversion of the mineral interest by filing a claim of interest, provided sufficient notice to affected owners. That court also appears to have found support for its conclusion in the fact that such owners would receive notice and an opportunity to be heard if a court

> should be called upon at some future time to determine whether the statutory conditions of mandatory reversion had occurred. We are unpersuaded by these reasons and others which analogize the statute to ordinary statutes of limitations. * * *"

Given this conflict among the various state courts on the question of the constitutionality of dormant mineral legislation, there is a substantial uncertainty as to the constitutional validity of such legislation. Such uncertainty will continue until this court fully addresses and resolves the constitutional questions presented by this type of legislation. This constitutional uncertainty is particularly harmful since it affects record ownership of real estate. Certainty in record ownership of real estate is essential to the development of the property. Until this court addresses the constitutional questions raised by this type of legislation, there will be a chilling effect on development of mineral interests in those states having such legislation, including Indiana.

Constitutional Defects of Statute

The most flagrant constitutional defect of the Indiana Mineral Lapse Act is its failure to require the giving of notice and to provide a hearing prior to the taking - euphemistically called a lapse in the act - of the mineral interest or within any meaningful time period after the taking as required by procedural due process of the Fourteenth Amendment of the United States Constitution. The Indiana Mineral Lapse Act makes no provision for giving notice or providing a hearing before or after the taking of the mineral interest; rather, it provides for a preemptory, automatic, self-executing and irremediable taking. Indiana Code 32-5-11-1 states:

> "Any interest in coal, oil and gas, and other minerals, *shall*, (emphasis added) if unused for

> a period of twenty years be extinguished, unless a Statement of Claim is filed in accordance with Section 5 hereof, and the ownership *shall* (emphasis added) revert to the then owner of the interest out of which it was carved."

Indiana Code 32-5-11-6 states:

> "Any persons who will succeed to the ownership of any mineral interest, upon the lapse thereof, *may* (emphasis added) give notice of the lapse of such mineral interest by publishing the same in a newspaper of general circulation in the county in which such mineral interest is located and, if the address of such mineral interest owner is shown of record or can be determined upon reasonable inquiry, by mailing within ten days after such publication a copy of such notice to the owner of such mineral interest. * * *"

As can be seen, there is no requirement that notice be given prior to the lapse of the mineral interest. After the lapse of the mineral interest, the successor in interest *may* give notice to the mineral interest owner of the fact that the interest has already lapsed. Therefore, the taking of the mineral interest becomes final before any notice provision of the Indiana Mineral Lapse Act applies and then the successor in interest has the option of giving notice of the lapse or remaining silent, without any significant difference in result in most cases, whether or not notice is given.

This court has stated many times in the past that due process of law prohibits the deprivation of property without providing notice and an opportunity for a hearing appropriate to the case. *Mullane v. Central Hanover Trust Company*, (1950) 339 U.S. 306, 313, 70 S.Ct. 652, 657, 94 L.Ed. 865, 872-73; *Memphis Light, Gas and Water Division v. Craft*, (1978) 436 U.S. 1, 98 S.Ct. 1554, 1562-63, 13-16, 56 L.Ed.2d 30, 41-43; *Ochoa v. Hernandez y Morales*, (1913) 230 U.S. 139, 33 S.Ct.

1033, 57 L.Ed. 1427, 1437. The Trial Court in the present case held the Indiana Mineral Lapse Act to be unconstitutional because of its failure to provide notice and a hearing as required by procedural due process. Furthermore, the Supreme Courts of the States of Wisconsin, Minnesota and Illinois held their states' dormant mineral legislation to be unconstitutional for failure to provide notice and a hearing pursuant to procedural due process requirements. *Chicago and Northwestern Transportation Company v. Pederson*, (1977) 80 Wis.2d 566, 259 N.W.2d 316; *Contos v. Herbst*, (1979) _____ Minn _____, 278 N.W.2d 732; *Wilson v. Bishop*, (October, 1980) _____ Ill _____, _____ N.E.2d _____.

The Indiana Mineral Lapse Act also violates Article 1, Section 10 of the Constitution of the United States by impairing the obligations of contracts. The Indiana Mineral Lapse Act provides for the transfer of a severed mineral interest from the owner of that interest to the person, or his successors or assigns, who contractually agreed to the original severance of the mineral interest. In two recent cases this court has reasserted that the contract clause is not without meaning in modern constitutional jurisprudence *United States Trust Company v. New Jersey*, (1977) 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92; *Allied Structural Steel Company v. Spannaus*, (1978) 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727, rehearing denied 99 S.Ct. 233. This court stated in the *Spannaus* decision that despite the customary deference courts give to state laws directed to economic problems, legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions appropriate to the public purpose justifying its adoption:

> "The severity of the impairment measures the height of the hurdle the state legislation must clear." (98 S.Ct. 2723.)

The Indiana Mineral Lapse Act totally destroys the effect of a contractual agreement to sever the mineral interest from the surface. This legislation was passed without any showing

that an emergency existed justifying this severe impairment. Furthermore, less extreme measures, including giving prior notice, an opportunity for a hearing, and compensation to the owner of the severed mineral interest for the taking could have been employed to achieve the same ends. One panel of the Michigan Court of Appeals in the case of *Bickle v. Fairchild* (1978) 83 Mich.App. 467, 268 N.W.2d 881, and the Supreme Court of the State of Nebraska in the case of *Wheelock v. Heath*, (1978) 201 Neb. 835, 272 N.W.2d 768, held that their respective state's dormant mineral legislation was constitutionally defective because of its violation of the contract clause of the United States Constitution.

Another basis on which the Indiana Mineral Lapse Act is unconstitutional is that it fails to compensate the owner of the mineral interest for the taking of that interest. This court has stated that it is a denial of due process to take property from one individual for the private use of another individual. *Missouri Pacific R. Co. v. Nebraska ex rel. Board of Transportation*, (1896) 164 U.S. 403, 417, 17 S.Ct. 130, 41 L.Ed. 489, 495. The Indiana Supreme Court in this case stated that the Indiana Mineral Lapse Act did not constitute an exercise by the state of its power of eminent domain in that it was not actually a taking of the mineral interest for the use and benefit of the state. *Short v. Texaco*, (1980) _____ Ind. _____, 406 N.E.2d 625, 631. However, this taking of property from one individual and transferring it to another individual is even more constitutionally defective since such a transfer is strictly prohibited by the due process clause of the Fourteenth Amendment. The Supreme Court of the State of Wisconsin in the case of *Chicago and Northwestern Transportation Company v. Pederson*, (1977) 80 Wis.2d 566, 259 N.W.2d 316, held that one of the constitutional defects of the Wisconsin dormant mineral legislation was that it violated the rule that the legislature could not take private property from one person for the private use of another.

Each of the above three bases of constitutional attack on the Indiana Mineral Lapse Act has been used by other jurisdictions in striking down similar types of dormant mineral

legislation. However, the Indiana Mineral Lapse Act also violates the equal protection clause of the Fourteenth Amendment, while the other dormant mineral statutes do not.

There is a provision in the Indiana Mineral Lapse Act, Indiana Code 1971, 32-5-11-5, which provides that owners of ten or more mineral interests in a county who inadvertently fail to file a Statement of Claim, having made diligent effort to preserve all such interests not being used in the county, must be given written notice prior to the lapse of their mineral interest, when similar protection is not provided to owners of less than ten mineral interests in the county. It is recognized that in the local economic sphere, only an invidious discrimination, or wholly arbitrary act, will violate the equal protection clause of the Fourteenth Amendment. *City of New Orleans v. Duke*, (1976) 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511. However, the aforementioned provision in the Indiana Mineral Lapse Act makes an invidious discrimination and constitutes an arbitrary classification. It provides procedural due process notice to owners of extensive mineral interests, who generally would have substantial capital and personnel to keep abreast of legislation affecting their mineral interests, but denies similar procedural due process protection to small mineral interest owners who are generally in greater need of such protection. Constitutional and statutory safeguards should be provided for everyone similarly situated - not only for the politically powerful. Furthermore, since the purpose of the Indiana Mineral Lapse Act is to promote the development of mineral interests by identifying and locating the owners of the mineral interest, this purpose would best be served by giving prior notice to all mineral interest owners along with an opportunity for all mineral interest owners to protect their rights by filing a statement of claim before the lapse becomes final. It would seem that the administrative inconvenience involved would be minimal in requiring that all mineral interest owners be given advance notice and an opportunity to file a statement of claim prior to the lapse. It is evident that this classification in the Mineral Lapse Act was created without due regard to its reasonableness.

CONCLUSION

Due to the conflict among the various states in construing the constitutionality of the dormant mineral legislation, and given the substantial constitutional questions raised by such legislation, this court should note probable jurisdiction of this appeal.

APPENDIX A

OPINION AND JUDGMENT OF THE SUPREME COURT OF INDIANA

FOR
PUBLICATION

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IN THE

SUPREME COURT OF INDIANA

LOUISE F. SHORT,	)	
	)	
Appellant,	)	
	)	
v.	)	NO. 179 S 23
	)	
TEXACO, INC., ROBERT BRASELTON, ELECTRA FIELDS, CHARLES BRASELTON, CHESTER BRASELTON, ROBERT E. BRASELTON, CLIFFORD N. BRASELTON, OSBORNE T. BRASELTON, JR., DAVID E. BURKHART, JOHN P. BRASELTON, ROSA G. BURKHART, D. W. MAYHEW d/b/a MAYHEW OIL AND GAS DEVELOPMENT, DeBEERS DIAMOND INVESTMENT, LTD.,	)	
	)	
Appellees,	)	
	)	
STATE OF INDIANA,	)	
	)	
Intervenor.	)	

ULYSSES G. WALDEN, JR. and CAROLYN SALLEE WALDEN,	)	
Appellants,	)	
v.	)	NO. 1278 S 303
EDEN H. POND, EDNA H. BOBE and CONSOLIDATION COAL CO.	)	
Appellees,	)	
LOUISE F. SHORT,	)	
Intervenor.	)	

APPEAL FROM THE GIBSON CIRCUIT COURT

The Honorable Walter H. Palmer, Judge

DeBRULER, J. -

The trial court declared Ind. Code § § 32-5-11-1 through 32-5-11-8, the Mineral Lapse Act, unconstitutional. The Act puts an end to interests in coal, oil, gas or other minerals which have not been used for twenty years. The "use" of a mineral interest which continues it in force includes actual production, payment of rents, royalties or taxes, or the filing of a claim in the dormant mineral interest record in the recorder's office. It granted owners of mineral interests a two year period of grace

after its effective date in which to file the claim and preserve the interest. This is an appeal from two judgments below, consolidated here, that termination of an interest under the Act is contrary to due process, equal protection, and the guarantee of just compensation for property taken by the State.

The Act reflects the legislative belief that the existence of a mineral interest about which there has been no display of activity or interest by the owners thereof for a period of twenty years or more is mischievous and contrary to the economic interests and welfare of the public. The existence of such stale and abandoned interests creates uncertainties in titles and constitutes an impediment to the development of the mineral interests that may be present and to the development of the surface rights as well. The Act removes this impediment by returning the severed mineral estate to the surface rights owner. There is a decided public interest to be served when this occurs. The extinguishment of such an interest makes the entire productive potential of the property again available for human use.

The trial court concluded that the legislative purpose of the Act is to facilitate the exploitation of energy sources and accepted such purpose as legitimate. While all its conclusions are not entirely clear, it went on to void the entire statute because it determined among other things that due process of law required the divestiture of the vested mineral interest to be preceded by due process notice and an opportunity to be heard.

Interests or estates in oil, gas, coal and other minerals lying beneath the surface of the land are interests in real estate for our purposes here, and as such are entitled beyond question to the firmest protection of the Constitution from irrational state action. They are vested property interests separate and distinct from the surface ownership. The State has no power to deprive an owner of such an interest without due process of law. They are entitled to the same protection as are fee simple titles. They are themselves of great utility and benefit to the society as a means of facilitating the development of

natural resources.

Courts of this state and nation have always given due regard to constitutional constraints upon their authority to void statutes. In doing so in *Noel v. Ewing*, (1857) 9 Ind. 37, we said:

> "It is due from the judiciary to sustain and reconcile their enactments, if possible. We will not lightly conclude that the lawmaking power has either ignorantly, or wilfully violated the constitution. To justify the Courts in declaring an act void, it must be clearly subversive of that instrument. (Citations omitted.)
>
> They who claim that the legislature has, in this particular, transcended its constitutional power, should be prepared to make a strong and clear case. All doubts must fall in favor of the validity of the law." 9 Ind. at 43.

We reaffirm again now in this case our adherence to this vital principle.

In *Chicago and North Western Transportation Co. v. Pedersen*, (1977) 80 Wis.2d 566, 259 N.W.2d 316, the Supreme Court of Wisconsin voided a similar act which directed that mineral rights revert to the surface fee ownership if they were not registered or taxes had not been paid on them. That statute was deemed contrary to procedural due process in that the mineral interest owner was not given notice or an opportunity to be heard prior to the reversion of his interest to the surface rights owner. That court relied upon *Mullane v. Central Hanover Bank & Trust Co.*, (1950) 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, and *Bell v. Burson*, (1971) 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90. The court below took the same tack in voiding the Indiana Act.

In *Mullane, supra*, primarily relied upon by the trial

court, the United States Supreme Court said:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.
>
> * * *
>
> An elementary and fundamental requirement of due process *in any proceeding* which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (Emphasis added.) 339 U.S. at 313, 314, 70 S.Ct. at. 656, 657.

In *Mullane* the bank petitioned a court for settlement of an account of a trust fund, and the sufficiency of publication notice to beneficiaries was the issue. Notice was due to the beneficiaries because a tribunal was about to adjudicate upon their property. The Mineral Lapse Act in contrast is self-executing and does not contemplate an adjudication before a tribunal before a lapse occurs. When the statutory conditions exist the lapse occurs. *Mullane* does not support the trial court conclusion that notice and hearing are due to a mineral interest owner prior to the occurrence of an extinguishment.

Bell v. Burson, supra, relied upon by the trial court does not support the conclusion either. There a Georgia law provided that the drivers license of an individual motorist involved in an accident is to be automatically suspended without notice or hearing if security was not posted to cover the damages claimed by aggrieved parties in the accident reports. In the course of holding this system violative of procedural due

process the court specifically noted:

> "If the statute barred the issuance of licenses to all motorists who did not carry liability insurance or who did not post security, the statute would not, under our cases, violate the Fourteenth Amendment. (Citations omitted.) It does not follow, however, that the amendment also permits the Georgia statutory scheme where not all motorists, but rather only motorists involved in accidents, are required to post security under penalty of loss of the licenses." 402 U.S. at 539, 91 S.Ct. at 1589.

Thus, even in *Bell*, a case involving a different complex of social concerns, there is this language supportive of the Act under consideration. It would support as consistent with procedural due process a legislative enactment which declared no more than that all licenses issued by the state would cease to be valid on a date certain in the future unless proof of financial responsibility were filed. Cf. *Frost & Frost Trucking Co. v. Railroad Commission*, (1926) 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101. Such a hypothetical statute would be very similar in operation to the Act being questioned in this case.

The Act under question does not provide for any adjudicatory process by a court or administrative agency. The absence of such a provision is not, we think, invalidating. The Act simply spells out the conditions which when existing mandate the extinguishment of an interest. If a court should be called upon to determine whether such conditions arose in a particular case so as to have effected the loss of an interest, the owner of such interest would be entitled to notice and an opportunity to be heard. Prior to any extinguishment the owner of an interest will have had notice by reason of the enactment itself of the conditions which would give rise to an extinguishment and at a minimum a two year opportunity to prevent those conditions from occurring by filing a statement of claim. *Anderson National Bank v. Luckett*, (1944) 321

U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692. That procedure is both simple and inexpensive. Based upon the foregoing analysis we do not find the case of *Chicago & North Western Transportation Co. v. Pederson, supra*, persuasive.

The reasoning of the trial court and the cases relied upon by it do not warrant the conclusion that the Act is unconstitutional because it fails to afford notice and hearing to mineral interest owners required by procedural due process.

The trial court also concluded that the extinguishment of mineral interests under the Act constituted a taking of property without due process of law. Judge Young for the Fourth District Court of Appeals summarized the due process analysis applicable here in *Foreman v. State ex rel. Department of Natural Resources*, (1979) _____ Ind. App. _____, 387 N.E. 2d 455:

> "The government has the inherent power or 'police power' to enact laws, within constitutional limits, to promote order, safety, health, morals, and the general welfare of society. . . .Property rights are not absolute and may be restricted by legislation which constitutes a proper exercise of the State's police power. . . .Legislation is a proper exercise of the police power when the collective benefit to the general public outweighs the restraint imposed. . . .The methods or means used to protect the public order, health, morals, safety or welfare must have some reasonable relation to the purpose or end sought." 387 N.E.2d at 460.

Study of this Act reveals that its outstanding feature is its declaration that mineral interests are terminable. Whatever may be the exact legal dimensions of such interests, they are not greater than fee simple titles. Under the statute of limitations and the law of adverse possession a fee simple title to land is terminable. The Mineral Lapse Act can be viewed as vesting legal title in the owner of the surface rights which is

free of the mineral servitude when the conditions required by it exist. A statute of limitations vests legal title in an adverse possessor as against the true legal owner when the conditions required by it exist. *Brown v. Anderson*, (1883) 90 Ind. 93. Statutes of limitation are statutes of repose founded upon a rule of necessity and convenience and the well-being of society. *Chase Securities Corp. v. Donaldson*, (1945) 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628. This Act is also based upon the same rule. Cf. *Love v. Lynchburg National Bank and Trust Co.*, (1965) 205 Va. 860, 140 S.E.2d 650. We do not disregard the distinctions between the two types of statutes. The element of possession is different. No cause of action has arisen in the owner of the mineral interest which is required to be prosecuted. Given these differences and aforementioned similarities, we believe that this Act is, according to its principal intent and effect, and for the purpose of constitutional analysis, analagous to acts of limitation which vests title to real and personal property.

Acts of limitation are not per se unconstitutional as impairing the obligation of contracts or as denying a person property without due process of law. This is so even though they extinguish the right of the party having a true title and vest a perfect title in the adverse holder. *Hawkins v. Barney's Lessee*, (1831) 5 Peters 457, is an early case upholding the validity of a seven year limitation upon actions to recover possession of land in Kentucky. In the course of that opinion it is said:

> "It is argued, that limitation laws although belonging to the lex fori, and applying immediately to the remedy, yet indirectly they effect a complete divesture and even transfer of right. This is unquestionably true, and yet in no wise fatal to the validity of this law. The right to appropriate a derelict is one of universal law, well known to the civil law, the common law, and all law; it existed in a state of nature, and is only modified by society, according to the discretion of each community."

The transfer of right upheld by the court was deemed the indirect product of the limitation law. The transfer or right effected by the Indiana Act under consideration is its direct product. That minor difference would not support a contrary evaluation of our Act.

In *Terry v. Anderson*, (1877) 95 U.S. 628, 24 L.Ed. 365, Chief Justice Waite stated the general rule regarding the manner in which statutes of limitation are received by courts:

> "This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. . . .
>
> In all such cases, the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the legislature is primarily the judge; and we cannot overrule the decision of that department of government, unless a palpable error has been committed." 95 U.S. at 632-633.

Indiana is in accord with the rule stated and the reasoning behind it. *Guthrie v. Wilson*, (1959) 240 Ind. 188, 162 N.E.2d 79; *Sansberry v. Hughes*, (1910) 174 Ind. 638, 92 N.E. 783. In *Terry* the court held that the period of nine months and seventeen days given to sue upon a cause of action was not unconstitutional. In *Turner v. People of State of New York*, (1897) 168 U.S. 90, 18 S.Ct. 38, 42 L.Ed. 392, a statute declaring that past sales and conveyances by a comptroller for nonpayment of taxes would be conclusively presumed regular six months after the effective day of the statute was upheld as providing a reasonable period for bringing an action. Pursuant to Ind. Code § 32-5-11-4, owners of mineral interests are granted a minimum of two years in which to act to preserve their interests. Such a period of grace would constitute a

reasonable time as contemplated by these cases.

In *Wilson v. Iseminger*, (1902) 185 U.S. 55, 22 S.Ct. 573, 46 L.Ed. 804, the United States Supreme Court upheld a statute which barred actions to recover ground rents, after twenty-one years had expired during which no declaration or acknowledgement of the existence of the right or claim had been made. The statute provided that the bar and extinguishment would not be effective until three years after the passage of the act. The court held that the act gave a reasonable time to the owners of the ground rents for preserving their rights. This case strongly supports the validity of our Act, because it upheld a statute having an extinguishment feature similar to the Indiana Act under consideration.

The purposes of this Act as stated above at the beginning of this opinion are to remedy uncertainties in titles and to facilitate the exploitation of energy sources and other valuable mineral resources. The dependence of local economies upon the mineral recovery industry and the entire State upon limited fossil fuel resources illustrates the public nature of these purposes. The objectives are valid and similar to those served by acts of limitation and the law of adverse possession. In limiting its incursion upon mineral rights to those which have been unused in the statutory sense for as long as twenty years, and in granting a two year period of grace after the enactment of the statute to preserve interests, the Legislature adopted means which are rationally related to such objectives, and which themselves provide a reasonable time and a simple and inexpensive method, taking into consideration the nature of the case, for preserving such interests. We find that this Act is within the police power of the states and does not unconstitutionally impair the obligation of contracts.

The trial court's judgment is arguably based upon the conclusion that the statute effectuates a taking of property without just compensation contrary to the mandate of Art. I, § 21, of the Indiana Constitution. We agree with appellant that extinguishment of mineral interests under this statutory scheme does not involve an exercise by the State of its power of eminent domain. The State through this statute is not

actually taking the mineral interest for its own use and benefit. Consequently, Art. I, § 21, does not provide an applicable standard for review of this statute. *Buckler v. Hilt*, (1936) 209 Ind. 541, 200 N.E. 219; *Foreman v. State ex rel. Department of National Resources, supra*. Appellees point to *Evansville & Crawfordsville R.R. Co. v. Dick*, (1857) 9 Ind. 433, in which this Court stated:

> "[T]he legislature have no power to authorize, in any case, either a direct or consequential injury to private property, without compensation to the owner." 9 Ind. at 436.

This statement in context gave support to the court's ruling that the power of eminent domain cannot serve as a source of immunity from suits for damages for injury to private property. The Mineral Lapse Act does not involve the injury to private property through conduct or activities of governmental agents or others having and exercising the power of eminent domain. It declares instead that a lapse of a mineral interest will occur in the event of specified conditions and circumstances. We are satisfied that substantive due process provides the proper standard for constitutional review of it.

Appellant next contends that the trial court erred in concluding that the Act is violative of the guarantees of Art. I, § 23, of the Indiana Constitution and the Fourteenth Amendment of equal protection of the law by reason of the special treatment afforded certain owners of mineral interests described in Ind. Code § 32-5-11-5. That provision states:

> "Failure to file a statement of claim within the time provided in section 4 shall not cause a mineral interest to be extinguished if the owner of such mineral interest:
>
> (1) was at the time of the expiration of the period provided in section four, the owner of ten or more mineral interests, as above defined, in the

county in which such mineral interest is located, and;

(2) made diligent effort to preserve all of such interests as were not being used, and did within a period of ten years prior to the expiration of the period provided in section 4 preserve other mineral interests, in said county, by the filing of statements of claim as herein required, and;

(3) failed to preserve such interest through inadvertence, and;

(4) filed the statement of claim herein required, within sixty days after publication of notice as provided in section seven herein, if such notice is published, and if no such notice is published, within sixty days after receiving actual knowledge that such mineral interest had lapsed."

By declaring the mineral interest terminable under the conditions set forth in the other sections of the Act, the Legislature sought to create an environment in which mineral interests will be promptly exploited or abandoned. If achieved, this objective would create economic benefits for the people and industries within local communities where actual development activities result and would create other land development where abandonment results. The criteria in Ind. Code § 32-5-11-5, can be rationally conceived as establishing a border line beyond which strict application of the Act's extinguishment standards would become destructive of these goals. Minerals exist within the earth in strata and formations which do not necessarily coincide with the manner in which man has chosen to divide the surface area. Consequently it is commonly necessary to assemble several mineral interests in order to render the extraction of minerals safe and profitable. The Legislature could reasonably have concluded that those meeting the criteria set forth above include those most likely to assemble such interests

and actually produce minerals. The separate classification of interests so held within these essential clusters is rationally related to the legitimate objective of the enactment and is consequently not contrary to the requirements of state and federal equal protection.

The Act seeks to remedy a situation thought to retard economic activity vital to the welfare of local communities and the general public as well. The classification erected does not involve a suspect classification or an impingement upon the exercise of a fundamental right, and consequently the traditional fair and substantial relation test is applicable to it. *Johnson et al. v. St. Vincent Hospital, Inc. et al.*, No. 1078 S 216 (Ind. 5/16/80); *Steup, et al. v. Indiana Housing Authority*, No. 1179 S 309 (Ind. 4/2/80). In this area of economic and social concern, legislative choices are entitled to a large degree of deference from the court. They are not required to be made with mathematical precision or along entirely logical lines. *Williamson v. Lee Optical of Oklahoma*, (1955) 348 U.S. 483, 487, 75 S.Ct. 461, 99 L.Ed. 563; *Indiana Aeronautics Com'n. v. Ambassadair Inc.*, (1977) 267 Ind. 137, 368 N.E.2d 1340.

> "In short, the judiciary may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, see, e.g. Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423, 72 S.Ct. 405, 407, 96 L.Ed. 469 (1952); in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." *City of New Orleans v. Dukes*, (1976) 427 U.S. 297, 303-304, 96 S.Ct. 2513, 2517, 49 L.Ed. 2d 511.

There has been no demonstration made which convinces us that the classification of Ind. Code § 32-5-11-5 is invidiously discriminatory or wholly arbitrary.

The judgments of the trial court here appealed from declaring the statute unconstitutional are reversed and the cases remanded to the trial court for enforcement of the Act.

Givan, C.J., Hunter, Prentice and Pivarnik, JJ., concur.

APPENDIX B

MEMORANDUM OPINION AND JUDGMENT ON AGREED CASE

IN THE

GIBSON CIRCUIT COURT

1978 TERM

EDEN H. POND	)	NO. C-78-17
EDNA H. BOBE	)	
CONSOLIDATION COAL CO.	)	FILED
	)	Russell Kern
vs.	)	July 24, 1978
	)	Clerk of the
ULYSSES G. WALDEN, JR.	)	Gibson Circuit Court
CAROLYN SALLEE WALDEN	)	

ORDER ENTRY, JULY 25, 1978

This case comes before this Court upon the Submission of an Agreed Case by the parties herein, pursuant to Indiana Code 1971, Sections 34-1-29-1 *et seq.*, with the necessary facts and Record, as defined in that statute. It is believed reiteration of the facts or of the Record are unnecessary except for reference.

The Trial Court wishes to express its gratitude to counsel for Plaintiffs, Defendants, Attorney General of the State of Indiana and Intervenor for their scholarly Briefs in this complicated legal issue.

The essential decision necessary in this case is to determine whether or not the so-called Indiana Mineral Lapse Statue, being I.C. 1971, 32-5-11-1 *et seq.* is constitutionally acceptable. If as contended by plaintiff it is unconstitutional, then plaintiff will prevail by judgment. If constitutional, there must necessarily be judgment for the defendants.

This Court feels that a short statement of matters of

concern by way of Memorandum may be helpful to those affected by this Decision, as well as those reviewing the action of this Court.

It cannot be rationally doubted that the State of Indiana reserves the right inherent in this organized society to act in the public welfare, even to the extent of impairment of private contract. *Home Building and Loan v. Blaisdell*, (1934) 290 U.S. 398. As a general proposition of Constitutional Law, however, this Court believes the U.S. Supreme Court normally will abstain upon issues relating to the contract laws of the individual States. However, there are discussions in cited cases as to the principles, *Blaisdell*, supra.

It should be noted in the Agreed Facts of this case that we are not discussing an issue of murky titles, or long-lost owners of interests. There is no "cloud" on the title to this real estate, except to the extent that the Statute challenged poses such a cloud. This Statute *creates* a challenge to vested property rights, by the statutory terms of non-use or failure to register. At Common Law, there could be no termination in mineral rights as a separate estate from the fee. The question then becomes, first: can the Indiana Legislature create such a challenge, and second: has the Legislature in this Statute done so in a Constitutionally acceptable manner.

This Court does not question that the Legislature had a valid purpose in passage of this Statute, i.e., exploitation of the State's energy sources, but the method chosen is believed to be unconstitutional.

As stated, very scholarly arguments are advanced for the proposition that the Statute is Constitutional. All of these arguments fail to answer the basic inequitable result of this case, that a judgment for the surface rights owners would give them a demonstrably valuable asset in derogation of their contractual purchase, with no notice to the mineral rights owners, and no compensation to the valid owners for their loss.

Suppose the State of Indiana had been the takers of these rights from the mineral owners for distribution to some one who would exploit them, arguably for the common good.

Would not Constitutionally there be a requirement of notice to the mineral owners, a right of hearing, some form of compensation, as, for example, the tax sale of real estate?

It seems clearly the law in this Country that before property rights can be taken from persons, these persons have some rights as to notice and hearing. The subject matter would govern what procedural requirements are involved, but Constitutionally it would seem the hearing would revolve around the facts essential to determination of the controversy. *Bell v. Burnson* (1971), 402 U.S. 535; *Mullane v. Central Hanover Bank and Trust Co.* (1950) 339 U.S. 306; *Goldberg v. Kelley* (1970), 397 U.S. 254.

Another unresolved question is, what harm would result had the statute required notice been given the mineral owners prior to the drastic severage and delivery of ownership from the mineral owner to the surface owner, at least such notice as is contemplated in *Mullane*, supra? It would perhaps induce litigation, but one queries whether that is not already the case with the statutory framework existing. The notice provision in I.C. 1971, 32-5-11-6 would seem just as precipitating a rule as would be notice prior to the legislature taking. Expediency is not always justice, whether the end sought is laudable or not.

For the reasons stated herein, this Court finds, Indiana Code, 1971 32-5-11-1, *et seq.* being Acts 1971, P.L. 423 is unconstitutional, void and of no effect.

This Memorandum of Opinion constitutes the Findings of Fact and The Conclusions of Law of This Court.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by this Court that there be judgment for the Plaintiffs herein and against the Defendants, that Plaintiffs shall recover their costs expended, that Plaintiffs, Eden H. Pond and Edna H. Bobe, are declared to be the equal owners as tenants in common of the mineral rights in the real estate in question pursuant to the Agreed Facts, and Consolidation Coal Company is the holder of a valid and subsisting lease covering said interests.

Judgment accordingly.

WALTER H. PALMER, JUDGE
GIBSON CIRCUIT COURT

APPENDIX C

ORDER OF THE INDIANA SUPREME COURT DENYING REHEARING

IN

SUPREME COURT OF INDIANA

LOUISE F. SHORT	)	
Appellant,	)	
	)	
vs.	)	NO. 179 S 23
	)	
TEXACO, INC., et al	)	
Appellees.	)	
ULYSSES G. WALDEN, JR., et al	)	
Appellants,	)	
	)	
vs.	)	NO. 1278 S 303
	)	
EDEN H. POND, et al	)	
Appellees.	)	

You are hereby notified that the Supreme Court has on this day denied Appellee's Petition for Rehearing.

Givan, C.J.

September 24, 1980

APPENDIX D

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

IN THE

SUPREME COURT OF INDIANA

ULYSSES G. WALDEN, JR. CAROLYN SALLEE WALDEN, Appellants vs. EDEN H. POND, EDNA H. BOBE, CONSOLIDATION COAL CO., Appellees LOUISE F. SHORT, Intervenor.	)	NO. 1278 S 303 Appeals from the Gibson Circuit Court The Honorable Walter H. Palmer, Judge FILED Marjorie H. O'Laughlin December 5, 1980 Clerk of the Indiana Supreme Court and Court of Appeals

Notice is hereby given that Eden H. Pond, Edna H. Bobe, and Consolidation Coal Company, the Appellees above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Indiana, reversing the judgment of the trial court, entered in this action on September 24, 1980.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph Two (2).

Dated this 5th day of December, 1980.

James M. Buthod

James M. Buthod (a Member of the Bar of the United States Supreme Court)

Attorney for Appellees Eden H. Pond, Edna H. Bobe and Consolidation Coal Company

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